United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original + Affidavit Filing

77-1411

To be argued by
Ronald G. Russo

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

LEE DiCAMILLO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

B
P/S

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York,
225 Cadman Plaza East,
Brooklyn, New Yokr 11201

HARVEY M. STONE,
RONALD G. RUSSO,
Assistant United States Attorneys,
(Of Counsel).

UNITED STATES COURT OF APPEALS
FILED
JUN 5 1978
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

TABLE OF CONTENTS

	Page
Preliminary Statement	1
ARGUMENT	2
CONCLUSION	5

Table of Cases

Curley v. United States, 160 F.2d 229 (D.C. Cir.), cert. denied , 331 U.S. 837 (1947)	4
United States v. Bohle, 475 F.2d 872 (2d Cir. 1973)	3
United States v. Lubrano, 529 F.2d 633 (2d Cir. 1975)	3
United States v. Stanchich, 550 F.2d 1294 (2d Cir. 1977)	4
United States v. Taylor, 464 F.2d 240 (2d Cir. 1972)	4

PRELIMINARY STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York (Neaher, J.) on a three count indictment appellant DiCamillo was found guilty of conspiring with Victor Raul Agudelo-Llano to violate the narcotics laws in violation of Title 21, United States Code, Section 846. In addition, DiCamillo was convicted of knowingly importing approximately 2100 grams of cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 952(a), and Llano was convicted of knowingly attempting to possess with intent to distribute the same cocaine in violation of Title 21, United States Code, Section 841(a) and Title 18, United States Code, Section 2.[1/] Following entry of a judgment of conviction on September 16, 1977, DiCamillo appeals on the sole ground that it was error for the district court to deny his motion for a judgment of acquittal based on the insufficiency of the evidence.

1/ Count One charged both defendants with conspiracy. Count Two charged DiCamillo alone and Count Three charged Llano alone. Llano has not appealed his conviction.

ARGUMENT[2/]

The sole point raised on this appeal is that the court below erred in denying appellant's application pursuant to Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal based on the insufficiency of the evidence. It is submitted that this claim is specious.

The evidence at trial established that DiCamillo, a salesman for Dahill-Mayflower Moving and Storage Company ("Dahill"), had traveled to Colombia in February, 1977 (A. 349).[3/] While there arrangements were made for a number of pieces of furniture to be shipped to DiCamillo at Kennedy Airport (A. 360) and that shipment consigned to "Lee DiCamillo", arrived in New York on March 16, 1977 (A. 44). Upon its arrival, certain Dahill employees were at the aiport to receive the shipment with instructions from DiCamillo to transport the furniture to a "Rodriguez" in Queens, New York (A. 110). Following the discovery by federal agents of cocaine secreted in the furniture, Dahill's employees assisted the government agents in making a controlled delivery of the furniture to "Rodriguez" (A. 14). Upon arrival at the Queens address, which had been written on a piece of paper by DiCamillo (A. 102), the agents met DiCamillo's co-defendant, Llano, who stated

---

2/ It should be noted that the Government, with leave of this Court, has filed an abbreviated brief without a Statement of Facts. For purposes of this appeal the Government adopts appellant's factual statement as its own except insofar as indicated in the Argument.

3/ The Government adopts the method of pagination used in Appellant's Brief.

that he was "Rodriguez" and signed the bill of lading with the name "Rodriguez". At this point Llano was arrested when he attempted to take control of the furniture containing the contraband (A. 21; A. 118).

Following Llano's arrest the agents travelled to Dahill's offices and interviewed DiCamillo concerning his knowledge of the shipment and the contents of the furniture (A. 122). Following this interview DiCamillo was transported to the office of the Drug Enforcement Administration at Kennedy Airport. With respect to that debriefing, Agent Sharkey testified:

> As I recall, we had asked him [DiCamillo] again about the shipment if there was anything suspicious about the shipment, that he knew of. He replied in the affirmative. He replied that it contained stuff. We had asked him what he had meant by stuff, and he said it was his knowledge and his belief that by stuff, he meant narcotics (A. 32-33).

It is respectfully submitted that these facts, which by no means represent the totality of the evidence against DiCamillo, are hardly consistent with innocence and that the court acted properly in submitting the case to the jury. Indeed, even if an innocent explanation is plausible, and the government does not concede it is, circumstantial evidence need not exclude all possible inferences but those of guilt. United States v. Lubrano, 529 F.2d 633, at 636 (2d Cir. 1975). Where the facts equally support inferences of guilt beyond a reasonable doubt or innocence, the jury's verdict should stand. United States v. Bohle, 475 F.2d 872, at 875 (2d Cir. 1973).

We submit that, viewed in its entirety and, as required, in the light most favorable to the government, and "giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact", the evidence here is such that "a reasonable mind might fairly conclude guilt beyond a reasonable doubt". United States v. Taylor, 464 F.2d 240, 243 (2d Cir. 1972), quoting from Curley v. United States, 160 F.2d 229, 232-33 (D.C. Cir.), cert. denied, 331 U.S. 837 (1947); United States v. Stanchich, 550 F.2d 1294, 1299 (2d Cir. 1977). Accordingly, the verdict of the jury should not be disturbed.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
June 5, 1978

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

HARVEY M. STONE,
RONALD G. RUSSO,
Assistant United States Attorneys,
(Of Counsel).

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

Ella Hill being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 5th day of June 19 78 he served a copy of the within Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to: Frank A. Lopez, Esq., 31 Smith Street, Brooklyn, N.Y. 11201

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Ella L. Hill

Sworn to before me this

5th day of June 19 78

Barbara Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979